IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
STEVEN ALLEN SCHWARTZ	:	NO. 04-231

MEMORANDUM

Bartle, J. April 11, 2005

Before the court is the motion of defendant Steven Allen Schwartz for a judgment of acquittal or a new trial. Defendant contends that: (1) the jury returned inconsistent verdicts; (2) the evidence presented at trial was insufficient as to his identity and as to any intent to defraud; and (3) the government improperly used information gained from immunized testimony defendant gave at his bail revocation hearing before Judge Stewart Dalzell.

Defendant was tried in November, 2004 on two counts of bank fraud and seven counts of wire fraud. The jury found him guilty on all nine counts. Thereafter and pursuant to the decision of the United States Supreme Court in Blakely v. Washington, 124 S. Ct. 2531 (2004), and upon agreement of the parties, the jury was given a supplemental special interrogatory and asked to determine whether the government had proven as to any count that the defendant had utilized "sophisticated means"

and/or had intended any amount of loss.[1] The jury found that Schwartz had not utilized sophisticated means as to any count, and he had not intended any loss. Defendant first maintains that the finding that he had not intended a loss on any count is inconsistent with the verdict of guilty on all counts and that therefore he is entitled to a judgment of acquittal or to a new trial.

This court gave the following charge as to the elements of bank fraud and wire fraud:

> In order to sustain its burden of proof for the crime of bank fraud, the government must prove the following three (3) elements beyond a reasonable doubt for each count:
>
> (1) the defendant executed or attempted to execute a scheme to defraud Providian Bank in Count One of the indictment and Capital One Bank in Count Two, or to obtain money by means of false or fraudulent pretenses, representations, or promises from those institutions;
>
> (2) he did so knowingly and with intent to defraud; and
>
> (3) Providian Bank and Capital One Bank were federally insured at the time of the offense.
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> In order to sustain its burden of proof for the crime of wire fraud, the government must prove the following three (3) elements beyond a reasonable doubt for each count:
>
> (1) the defendant knowingly devised a scheme to defraud or to obtain money or property by materially false or fraudulent pretenses, representations, or promises;

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1. Now that the Supreme Court has decided United States v. Booker, 125 S. Ct. 738 (2005), it is clear that the separate submission of the issues of sophisticated means and intended loss to the jury is not warranted.

(2) he did so with the intent to defraud; and
(3) in advancing or furthering or carrying out this scheme, he used or caused to be used a wire communication in interstate commerce.

As further explanation of the elements, the court instructed, in relevant part:

> A scheme to defraud or to obtain money is any deliberate plan of action or course of conduct by which someone intends to deceive or to cheat another or by which someone intends to deprive another of something of value.

The court also stated:

> It is not necessary for the government to prove that the defendant was actually successful in defrauding anyone or was successful in obtaining money by means of false or fraudulent pretenses, representations, or promises. Thus, it is the scheme itself which is unlawful, not the result.

In addition, we charged the jury as to the element of "intent to defraud":

> To act with an intent to defraud means to act knowingly and with the intention or the purpose to deceive or to cheat. A person acts knowingly when he is aware of what he is doing and is not acting due to some accident or mistake. An intent to defraud generally is accompanied by a desire or a purpose to bring about some gain or benefit to oneself or some other person or by a desire or a purpose to cause some loss to some person.
>
> Honest mistakes in judgment or errors in management do not rise to the level of intent to defraud. However, good faith does not mean the hope that, eventually, a scheme will come out "even" or the hope that the money which is taken by a scheme will eventually be paid back. Similarly, the fact that the

> money obtained through a scheme to defraud may have been used for legitimate business purposes or to pay business expenses is not a defense.

Therefore, in order to find the defendant guilty on the bank fraud counts, the jury had to find either: (1) that the defendant executed or attempted to execute a scheme to defraud; or (2) that the defendant executed or attempted to execute a scheme to obtain money by means of false or fraudulent pretenses, representations, or promises. Similarly, in order to find the defendant guilty on the wire fraud counts, the jury had to find either: (1) that the defendant knowingly devised a scheme to defraud; or (2) that he knowingly devised a scheme to obtain money or property by materially false or fraudulent pretenses, representations, or promises. As described in the charge, intent to defraud is generally accompanied by a desire or a purpose to bring about some gain or benefit to oneself or some other person or by a desire or a purpose to cause a loss to some person.

Thus, the jury needed only to find that the defendant executed or attempted to execute a scheme to defraud on the bank fraud counts and that he knowingly devised a scheme to defraud on the wire fraud counts, in each case with a desire or a purpose to bring about some gain or benefit to himself, even though he may not have intended any loss. As we made clear in our instructions to the jury, to which there was no objection, intended loss is not a prerequisite for finding a person guilty of either bank fraud or wire fraud.

Nonetheless, even if the verdicts were inconsistent, such a finding would not merit a judgment of acquittal or a new trial. The Supreme Court stated in United States v. Powell, 469 U.S. 57, 64-65 (1984), that "where truly inconsistent verdicts have been reached, '[t]he most that can be said ... is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show they were not convinced of the defendant's guilt.'" Id. (citing Dunn v. United States, 284 U.S. 390, 393 (1932)).[2] As noted by the Supreme Court, jury mistake, compromise, or lenity may well produce inconsistent verdicts and inconsistency does not necessitate reversal of a conviction. Powell, 469 U.S. at 65. See also United States v. Gross, 961 F.2d 1097, 1107 (3d Cir. 1992). As the government has no recourse to appeal or otherwise upset an acquittal, neither should the defendant be allowed to receive a new trial on the conviction because of an inconsistent verdict. See Powell, 469 U.S. at 64-65.

Defendant next argues that the evidence as to his identity and as to the intent to defraud was insufficient for conviction on any of the nine counts. Essentially, the indictment charged that defendant used his Citizens Bank checking account to make on-line payments to credit card companies where

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2. The Supreme Court in Powell noted, however, that where a defendant is convicted of two mutually exclusive crimes, the situation may require a different resolution from the situation at hand, where the purported inconsistency is between a conviction and an acquittal. Powell, 469 U.S. at 479 n.8.

he held credit cards and to a debit account held with a company called PrePaid ATM while he had insufficient funds in his checking account to make these payments. His purpose in doing so was to cause these institutions to believe the payments had been made so that they would extend additional credit or debit funds. Specifically, the government maintained that the defendant committed bank fraud by using the credit made available by his on-line payments to incur additional charges on his credit cards. Likewise, the government contended that by using the debit funds made available by his on-line payments to PrePaid ATM, defendant committed wire fraud. Defendant argues that the government failed to present any evidence that he was in fact the individual controlling any of the bank, credit card, or PrePaid ATM accounts at issue or that he conducted any of the transactions in those accounts.[3]

In the government's case in chief, Mr. Charles Becker of Citizens Bank of Pennsylvania identified "bank statements assigned to customer Steven Schwartz" which showed balances and reflected a number of on-line transactions. Tr. Nov. 16, 2004 at 1.40-51. Ms. Cecilie Garcia of Capital One testified as to "credit-card records in the name of Steven Schwartz held with

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3. Defendant contends also that the conduct at issue does not rise to the level of the crimes charged. He argues that merely writing a bad check, the equivalent of the behavior charged, is not a representation cognizable under the relevant statutes and that the jury should have been so instructed. No such instruction was requested, however, and no objection was made to the charge as given.

Capital One" which reflected on-line transactions. Tr. Nov. 17, 2004 at 2.3, 2.5. Testimony also was given by Mr. Alan Ross of PrePaid ATM as to "account records of Mr. Schwartz" and on-line transactions that Mr. Schwartz made. Tr. Nov. 17, 2004 at 2.48-49, 2.52-57. Mr. Ross explained that when an account is opened, an account holder must send a copy of one of his or her own checks to the company in order to use the "instant ACH" feature to write electronic checks. Tr. Nov. 17, 2004 at 2.51.

The evidence, of course, must be viewed in the light most favorable to the prosecution as the verdict winner. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). Clearly there was sufficient evidence in the record for a rational trier of fact to find beyond a reasonable doubt that Steven Schwartz was the one who committed the crimes at issue and that the elements of the crimes charged were made out. See id.

Finally, defendant contends that the government utilized information obtained after being exposed to immunized testimony given by defendant during his bail revocation hearing before Judge Stewart Dalzell on March 25, 2004. Specifically, at that hearing, Judge Dalzell determined, based on the charges underlying this case, that there was probable cause to believe defendant had engaged in criminal activity while on supervised release. This determination led to a rebuttable presumption under the Bail Reform Act, 18 U.S.C. § 3148(b), that there was no condition or combinations of conditions to prevent further harm to the community. Defendant argues that he testified under a

grant of use-fruits immunity at the bail revocation hearing in order to rebut that presumption. See United States v. Perry, 788 F.2d 100, 115-16 (3d Cir.), cert. denied, 479 U.S. 864 (1986).[4] Defendant's testimony included statements that he had expected a Mr. William Catanese to arrange a loan for him and deposit money directly into his Citizens Bank account. He also testified that he had anticipated funding the payments for some of the transactions at issue in this case through a refinancing transaction involving the sale of his mother's home.

The government does not contest that it conducted investigations on the basis of defendant's testimony at his bail revocation hearing. However, it contends that this testimony was not immunized because the defendant intended it as exculpatory evidence to negate any intent to defraud. The government thereafter investigated the potentially exculpatory evidence, in part using the grand jury as an investigative arm to obtain all the facts regarding the loan. This investigation was conducted pursuant to United States Attorney's Office policy requiring a prosecutor conducting a grand jury inquiry to present or otherwise disclose substantial evidence of which the prosecutor is personally aware that directly negates the guilt of a subject of an investigation. At trial, the government presented the

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4. Because the presumption of dangerousness may force a defendant to choose between self-incrimination and preventive detention, a judicial grant of use-fruits immunity must be available to a defendant facing pretrial detention to ensure conformity to the Fifth Amendment. Perry, 788 F.2d at 115-16.

testimony of Mr. Alan Goodman, who testified that he had purchased the home of the defendant's mother in July, 2003. The government made reference to this testimony in its closing argument, linking the proceeds of the sale to the defendant's subsequent repayments on his credit cards. No objection to Mr. Goodman's testimony was made. Mr. Catanese never testified at the trial.

If a defendant testified under a grant of immunity, "the government [has] the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." Kastigar v. United States, 406 U.S. 441, 461-62 (1972); United States v. Pantone, 634 F.2d 716, 719 (3d Cir. 1980). Although evidence of the real estate transfer is a matter of public record, the government concedes that the evidence at issue was derived from testimony given by the defendant at his bail revocation proceeding and not from an independent source.

Assuming the government misused defendant's immunized testimony by presenting Mr. Goodman's testimony about his purchase of Mrs. Schwartz's house, such misuse was harmless beyond a reasonable doubt. See Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991); Lewis v. Pinchak, 348 F.3d 355, 357-58 (3d Cir. 2003). This evidence did not bear on any element of the crimes charged, indeed it was peripheral at best. The government presented substantial evidence to support the verdict.

The motion of defendant Steven Allen Schwartz for judgment of acquittal or for a new trial will be denied.

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ORDER

AND NOW, on this 11th day of April, 2005, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the "post-verdict motion of defendant Steven Allen Schwartz" for judgment of acquittal or for a new trial is DENIED.

BY THE COURT:

/s/ Harvey Bartle III
J.